(59-D)



IN THE

# Supreme Court of the United States

**October Term, 1972**

**Nos. 72-694, 72-753, 72-791, 72-929**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*, *Appellants,*

*v.*

EWALD B. NYQUIST, etc., *et al.*, *Appellees.*

WARREN M. ANDERSON, as Majority Leader and President Pro Tem. of the New York State Senate, *Appellant,*

*v.*

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*, *Appellees.*

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, *et al.*, *Appellants,*

*v.*

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*, *Appellees.*

PRISCILLA L. CHERRY, *et al.*, *Appellants,*

*v.*

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEES-APPELLANTS NYQUIST, LEVITT AND GALLMAN

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## Preliminary Statement

The order of this Court noting probable jurisdiction in No. 72-694, *Committee for Public Education and Religious Liberty* v. *Nyquist;* No. 72-753, *Brydges* v. *Committee for Public Education and Religious Liberty;* No. 72-791; *Nyquist* v. *Committee for Public Education and Religious Liberty;* and No. 72-929; *Cherry* v. *Committee for Public Education and Religious Liberty,* directed that the appeals be consolidated. By agreement among counsel, a single Appendix has been filed. Each party's brief will cover the issues in all the appeals, and the appellants in 72-694 will be deemed the appellants in the consolidated appeal. The appellants in No. 72-694 will hereinafter be referred to as appellants-appellees and the appellants in the other cases as appellees-appellants.

## Citation to Opinions Below

The opinions of the United States District Court for the Southern District of New York are reported at 350 F. Supp. 655 (printed in Appendix to Jurisdictional Statement of Appellants Nyquist, Levitt and Gallman).

## Jurisdiction

The appeals herein are from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, §§ 2281 and 2284. The judgment holds chapter 414 of the New York Laws of 1972 to be constitutional and not to violate the Establishment Clause of the First Amendment to the Constitution of the United States insofar as it provides for a modification of adjusted gross income, for State income tax purposes, to tuition-paying parents of children

attending nonpublic schools. However, the judgment also holds chapter 414 to be in part unconstitutional on the ground that it violates the Establishment Clause of the First Amendment insofar as it provides for the payment of health and safety grants to nonpublic sectarian schools and provides for the reimbursement of a part of tuition paid to nonpublic schools by low-income parents, and enjoins the defendants Nyquist and Levitt from making payments under that chapter to nonpublic schools in the State or to low-income parents for tuition reimbursement.

The complaint sought declaratory and injunctive relief against the implementation of chapter 414, alleging that the statute violated the Establishment Clause by providing payments to sectarian nonpublic schools for operation and maintenance expenses necessary to protect the health and safety of children attending those schools, by providing for the reimbursement of a portion of tuition paid by low-income parents to nonpublic schools for the education of their children, and by providing for a modification of adjusted gross income, for State income tax purposes, to tuition-paying parents of children attending nonpublic school in the State.

The final judgment, granting in part the relief sought in the complaint, and dismissing the complaint as to the remainder, was made and entered October 20, 1972. Notice of appeal on behalf of the plaintiffs was filed on November 3, 1972 from that part of the judgment which held the modification of gross income provisions to be constitutional (a copy of which is printed in the Appendix to appellants-appellees Statement as to Jurisdiction). A notice of appeal was filed by defendants Nyquist, Levitt and Gallman on November 8, 1972, from all those parts of the judgment which held parts of chapter 414 unconstitutional and enjoined the implementation of those provisions (a copy of

which is printed in the Appendix to the Statement as to Jurisdiction on behalf of those appellees-appellants). Notices of appeal were also filed on behalf of intervenor-defendant parents of children enrolled in nonpublic schools from that part of the judgment relating to tuition reimbursements and by intervenor-defendant Brydges (for whom Senator Warren Anderson has been substituted) from that part of the judgment which held provisions of chapter 414 to be unconstitutional (copies of those notices of appeal are printed in the appendices to the respective Statements as to Jurisdiction on behalf of those appellees-appellants).

The appeals were docketed November 6, 22 and 29 and December 26, 1972, respectively. Probable jurisdiction was noted on January 22, 1973 and the appeals ordered consolidated for the purposes of argument.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, §§ 1253 and 2101(b).

**Constitutional and Statutory Provisions Involved**

The constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

> "Congress shall make no law respecting an establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States.

Chapter 414 of the New York Laws of 1972 is summarized herein as pertinent to this appeal (the full text is set out as an Appendix to this brief):

Section 1 of chapter 414 adds a new Article 12 to the New York State Education Law (McKinney's Consolidated Laws of New York, Book 16), providing for health and safety grants to nonpublic schools. The grants would be payable only to nonpublic schools which have been certified under Title IV of the Federal Higher Education Act of 1965 as serving a high concentration of pupils from low-income families. The grants, in the amount of $30 per pupil plus an additional $10 per pupil attending school in a building constructed prior to 1947, would be payable for maintenance and repair of nonpublic schools. The New York Legislature specifically found, in enacting this legislation, that these grants are necessary to protect the health, safety and welfare of children attending nonpublic schools, particularly those schools where the financial resources of the parents are not sufficient to adequately maintain the structures.

Section 2 of chapter 414 adds a new Article 12-A to the New York Education Law, providing an equal educational opportunity program. This Article provides for the reimbursement of parents, with a taxable annual income of less than $5,000, for not more than 50% of the cost of tuition paid to a nonpublic school on behalf of their children. In so doing, the Legislature specifically found that the constitutionally guaranteed right of parents to select a nonpublic school education for their children is diminished or effectively denied to parents of low income who are unable to afford the tuition necessary to select such an education. In accordance with the State's established policy of providing for the economic and constitutional necessities of its low-income citizens, the New York Legislature enacted this article which provides for the reimbursement of a portion of the tuition paid by such parents.

The third portion of the statute (sections 3, 4 and 5 of the chapter) added a new subsection j to section 612 of the New York Tax Law, affording a modification of "adjusted gross income" to parents who pay nonpublic school tuition on behalf of their children. The parents' adjusted gross taxable income would be reduced by a fixed amount per child attending nonpublic school, based on a sliding scale under which the highest amount of modification of income would be attributable to persons with the lowest adjusted gross income.[1] Parents who claim tuition reimbursement pursuant to Article 12-A of the Education Law would not also be entitled to claim the modification of adjusted gross income here provided.

Additional provisions of chapter 414, which are not at issue in this action, provide additional state aid to school districts whose enrollment is substantially increased as a result of the closing of nonpublic schools and provide special provisions facilitating the purchase by public school districts of buildings of closed nonpublic schools.

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[1] Modifications of adjusted gross income may be claimed by parents in accordance with the following scale for each dependent attending nonpublic elementary or secondary schools, up to a maximum of three such dependents:

| If New York adjusted gross income is: | The amount Allowable for each dependent is: |
|---|---|
| Less than $ 9,000 | $1,000 |
| 9,000—10,999 | 850 |
| 11,000—12,999 | 700 |
| 13,000—14,999 | 550 |
| 15,000—16,999 | 400 |
| 17,000—18,999 | 250 |
| 19,000—20,999 | 150 |
| 21,000—22,999 | 125 |
| 23,000—24,999 | 100 |
| 25,000 and over | -0- |

## Questions Presented for Review

1. Does the election by the Legislature, in the exercise of its sovereign power of taxation, to exclude from taxable income a portion of the income of *parents* paying tuition to nonpublic schools on behalf of their children attending such schools constitute the establishment of a religion or prohibited aid to religion, or does it, on the contrary, constitute a nonreviewable legislative exercise of the power of taxation?

2. Do grants to nonpublic schools for maintenance, repair and physical operation of those schools, in the exercise of the State's police power and for the specific purpose of protecting the health and safety of the children attending those schools, constitute an establishment of religion in violation of the First Amendment to the Constitution of the United States?

3. Are not the health and safety grants, so provided, a neutral form of aid similar to those forms of aid to nonpublic schools which have previously been approved by this Court?

4. Does not the partial reimbursement of tuition, paid by low-income parents to nonpublic schools on behalf of their children, constitute a valid State expenditure either for the purpose of guaranteeing to persons of low income the freedom to exercise their constitutionally protected right to select a nonpublic school education for their children or for the purpose of fulfilling the State's obligation to provide for the necessities of life and for access to constitutional rights to persons of low income?

## Statement of the Case

On May 22, 1972, Governor Rockefeller signed into law an act which provides health and safety grants to nonpublic schools, reimbursement of tuition to low-income parents of children in nonpublic schools, a modification of adjusted gross income in computing state income taxes to parents of children in nonpublic schools, impact aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provides for the financing of the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (New York Laws of 1972, chapter 414).

Three days later, on May 25, 1972, plaintiffs commenced this action by filing the complaint in the United States District Court for the Southern District of New York, seeking to have sections 1, 2, 3, 4 and 5 of chapter 414 declared unconstitutional, alleging that those provisions violate the Establishment Clause of the First Amendment to the Constitution of the United States. The complaint also sought an injunction restraining payments of State funds in implementation of sections 1 and 2 of the act and restraining the implementation of the tax provisions of sections 3, 4 and 5 of the act.

A motion to intervene in the action was made by several parents of children enrolled in nonpublic schools and who would be the beneficiaries of the act. The motion was granted.

A motion to intervene was also made by Earl W. Brydges, the then Majority Leader and President *Pro Tem.* of the New York State Senate. That motion was also granted. Senator Warren Anderson, the present Majority Leader and President *Pro Tem.*, has been substituted for Senator Brydges on this appeal.

Chapter 414 adds a new Article 12 to the New York Education Law, providing for health and safety grants to nonpublic schools. The grants would be payable only to nonpublic schools which have been certified under Title IV of the Federal Higher Education Act of 1965 as serving a high concentration of pupils from low-income families. The grants, in the amount of $30 per pupil plus an additional $10 per pupil attending school in a building constructed prior to 1947, would be payable for maintenance and repair of those nonpublic school buildings. The Legislature has specifically found, in enacting this legislation, that these grants are necessary to protect the health, safety and welfare of children attending nonpublic schools, particularly in those areas where the financial resources of the parents are not sufficient to adequately maintain the structures.

Chapter 414 also adds a new Article 12-A to the Education Law, providing an equal educational opportunity program. This Article provides for the reimbursement of parents, with a taxable income of $5,000 or less, for not more than 50% of the cost of tuition paid to a nonpublic school on behalf of their children. In so doing, the Legislature specifically found that the constitutionally guaranteed right of parents to select a nonpublic school education for their children is diminished or effectively denied to parents of low-income who are unable to afford the tuition necessary to select such an education. In accordance with the State's established policy of providing for the economic and constitutional necessities of persons of low income, the Legislature enacted this article which provides for the reimbursement of a portion of tuition paid by such persons for the benefit of their children.

The third portion of the statute which is challenged in this action is subsection j of section 612 of the New York Tax Law, which affords a modification of "adjusted gross income" to parents who pay nonpublic school tuition. The parents' adjusted gross taxable income would be reduced by a fixed amount per child attending a nonpublic school, based on a sliding scale under which parents with the lowest incomes receive the greatest modification. Parents who claim tuition reimbursement pursuant to Article 12-A of the Education Law would not also be entitled to claim the modification of income here provided.

The District Court, in its decision, specifically held that it accepted the findings of the Legislature as to the purposes of each of the enactments, and that those findings sum up legislative purposes which are secular in intent. Thus, as relevant to this appeal, the Court expressly started with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas, with the assumption that the Legislature intended to provide an opporunity for a quality education for all children and to preserve a pluralistic society by providing money to poor parents for tuition payments to nonpublic schools for their children and intended to provide tax relief to parents of children attending nonpublic schools, at least partially in recognition of the fact that their support of tax exempt nonpublic schools relieves the taxpayers of additional costs of public education for these children.

Relying primarily upon the recent decisions of this Court in *Lemon* v. *Kurtzman* (403 U. S. 602 [1971]), *Tilton* v. *Richardson* (403 U. S. 672 [1971]), and *Walz* v. *Tax Commission* (397 U. S. 664 [1970]), the District Court held that public moneys may not be used for the repair or main-

tenance of nonpublic school buildings in which the religious and secular functions are combined. In response to the argument that repair and maintenance are neutral in character, not sectarian, the Court rejected the contention that nonpublic school budgets are divisible and held that subsidies of public moneys even for secular purposes, lighten sectarian school budget demands and make possible the diversion, to religious purposes, of funds which the schools would otherwise have had to expend for the upkeep of the physical plants of the schools. This latter result, the Court found, rendered the statute in violation of the First Amendment to the Constitution of the United States. The District Court also found that any money payment to the schools, for whatever purpose, was a relationship "pregnant with involvement" and invited excessive entanglement between government and religion. While the Court accepted the argument that the statute was an exercise of the State's police power, it held that that could not validate the statute where it was found to violate a provision of the Federal Constitution.

As to section 2 of the State statute, the District Court found that the parents receiving the money were only conduits for the payment of the money to the nonpublic schools in the form of tuition. Recognizing that the poor should have equal rights with the rich to practice their religions and that the conditions of rich and poor should be the responsibility of the particular religious denomination, not of the State. Nor did the Court find any support for the statute in the potential effect upon public education if nonpublic schools were to close in substantial numbers because of financial difficulties. The Court expressed a belief that support of nonpublic schools in any degree, based on such an argument, could lead to complete support of sectarian education by the State.

However, as to the provisions of the statute providing a modification of adjusted gross taxable income for income tax purposes, the majority of the Court found no constitutional violation. The Court based its finding of constitutionality on five grounds (Jurisdictional Statement, p. A27):

> "In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State.* Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the ongoing political activity as likely, in our opinion, to cause division on strictly religious lines."

The Court equated the modification of gross income provisions of this statute to the theory supporting the constitutionality of real property and income tax exemption of religious institutions and income tax deductions for contributions to religious bodies.

One member of the District Court (HAYS, Circuit Judge) dissented solely in relation to the holding of the majority that the modification of gross income provisions were constitutional. He would have found that the provisions of this part of the act also had the effect of subsidizing religion and would thus be unconstitutional.

## Summary of Argument

No one will question that a State may not use tax money for the purpose of supporting religion. That, however, is not really the issue in this case. The District Court specifically found that each part of the statute at issue here enacts a secular legislative purpose, that is, provision of safe and healthful schools for children to attend, provision of equality of opportunity to exercise constitutional rights to low-income parents, and tax relief for parents who support both public and nonpublic schools.

In the implementation of its sovereign power to tax, the State has plenary power to select the objects of taxation. It may select what income to tax and how much to tax it. The State may provide for deductions from gross income for income tax purposes in any manner or degree which it sees fit. This is an inherent attribute of the power to tax, and the exercise of that power raises no issue of constitutional violation. Additionally, as the District Court found, the modification of adjusted gross income at issue here is similar to real property tax exemption or deductions for contributions—it does not act as an unconstitutional subsidy to religion. The benefits to religion, in the case of the modification of adjusted gross income here provided, are so remote as to create no constitutional issue.

In the case of the health and safety grants to nonpublic schools, the New York Legislature has found, and the District Court accepted those findings, that the financial crisis of nonpublic schools in low-income areas has resulted in a diminution in proper repair and maintenance of the school buildings and has endangered the health and safety of the children attending those schools. The issue presented in this appeal is whether the State, in the exercise

of its police power, to protect the health and safety of its children may provide payments to the nonpublic schools in low-income areas which partially reimburse the schools for operation and maintenance costs necessary to maintain adequate standards of health and safety. The moneys are not provided for the teaching function of the schools, but rather for structural maintenance for a specific police power purpose. This Court has in the past rejected the argument that payments which lighten the burden of the nonpublic schools budget and thus release moneys for sectarian purposes are thereby rendered unconstitutional. Yet that argument was relied upon by the Court below in this case. This Court has also held that the State may constitutionally provide "neutral and nonideological" services to nonpublic schools. The appellees-appellants here argue that the provision of health and safety grants to nonpublic schools are "neutral and nonideological" and are constitutional, and a valid exercise of the State's police power.

The provision of tuition reimbursement to low-income parents of children enrolled in nonpublic schools is the State's attempt to reconcile two constitutional principles. This Court has held that parents have a constitutional right to select a nonpublic school education for their children, a right which cannot be taken away from them by the State. There has also developed, in recent years, a body of law which holds that persons may not be denied the exercise of their constitutional rights by virtue of their inability to pay the cost of those rights. The States have been required to provide free counsel to indigents in criminal cases, to provide free transcripts to indigents for the purpose of criminal appeals, to provide the right to vote free of the obligation to pay poll taxes, and to provide access to the Courts free of State-imposed costs in some civil

cases. Further, the State and Federal government have both accepted the obligation to provide for the economic necessities of life for the poor. In enacting the tuition reimbursement provisions at issue here, the Legislature found that the right of low-income parents to select a nonpublic school education for their children was diminished or denied by virtue of their inability to pay tuition costs. In order to protect the constitutional right of such parents to equal educational opportunity for their children, the New York Legislature adopted this statute which would partially reimburse them for tuition paid to nonpublic schools. Not all parents are so reimbursed, solely those whose low income level operates to exclude them from rights available to those with greater wealth. Here too the payments are not made to the schools, and have only a remote benefit to those schools.

In all of the portions of the bill under attack in this proceeding, the New York Legislature sought to advance secular purposes and not to aid religion. The purpose and primary effect of all these proposals was secular and they do not result in an excessive entanglement between Church and State.

## ARGUMENT.

### I.

**A state statute which authorizes a modification of adjusted gross income for parents paying nonpublic school tuition for their children is an exercise of the sovereign power of the State to enact tax statutes and does not infringe upon the Establishment Clause of the First Amendment to the Constitution of the United States.**

The New York State Constitution, Article III, § 22 establishes the powers of the State Legislature in the enactment of income tax legislation. That section provides that the Legislature, in imposing any tax to be measured by income, may define the measure of the income to be taxed, and may prescribe exceptions to and modifications of any such provision at any time.

New York Tax Law, § 612(a) provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income as defined by the laws of the United States, less a number of modifications. Generally, deductions and exemptions from gross income, in determining State net taxable income, are the same as those used in determining Federal net taxable income. There are, however, additions and modifications which are provided solely in State law. For example, a deduction is not allowed on State returns for income taxes paid to the State although it is allowed on Federal returns, and deductions for life insurance premiums are allowed on State returns although not on Federal.

The addition of new subsection j to section 612 of the Tax Law, by chapter 414 of the Laws of 1972, was no more and no less than an exercise of the State's inherent power

to determine the measure of personal income subject to taxation by the State. That new subsection adds a provision for modification of adjusted gross income, in determining net taxable income, for those parents who pay tuition for their children attending nonpublic schools.

The provision sets up the modification as a sliding-scale amount deductible from gross income for every child, not exceeding three, attending nonpublic schools. The fixed amount varies, depending upon gross income of the parents, with the largest modification available to those with the lowest incomes. A parent with a taxable income less than $5,000 must elect either the modification of adjusted gross income or tuition reimbursement provided by Education Law, Article 12-A, and may not obtain the benefits of both provisions.

This Court has recognized that it is an inherent attribute of the states to be free, in the normal exercise of the power to tax, to select the subjects of taxation and to grant exemptions, and that inequalities which may result from a singling out of one particular class for taxation or exemption from taxation infringe upon no constitutional rights or limitations, so long as they have a rational basis (*Carmichael* v. *So. Coal Co.*, 301 U. S. 495 [1937]; *People ex rel. Moffet* v. *Bates*, 276 App. Div. 38, affd. 301 N. Y. 597, cert. den., 340 U. S. 865 [1950]).

The history of the taxing power of the United States clearly bears out that conclusion. In *The Federalist*, Alexander Hamilton described the taxing power conferred by the Constitution upon the Federal government to be "a concurrent and coequal authority in the United States, and in the individual states" (*The Federalist*, No. XXXII). From the prohibition contained in the proposed Constitu-

tion of the United States, restraining the states from the imposition of duties on imports and exports, Hamilton concluded that the power of the states was so plenary that except for the express prohibition the states would have had the inherent power to impose such duties.

Since those powers of taxation are coequal, the decisions of this Court relating to the Federal government's powers in relation to the taxation of income also apply with equal force to the powers of the States.

In *Sonzinsky* v. *United States* (300 U. S. 506 [1937]), this Court clearly stated the principle of taxation which we contend is controlling in this case, stating (p. 512):

> "In the exercise of its constitutional poker to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others."

and in *Fernandez* v. *Wiener* (326 U. S. 340 [1945]), both as to the power of Congress and the states, this Court stated (pp. 351-352):

> "It is a revenue measure enacted in the exercise of the federal power to lay and collect an excise. Congress has a wide latitude in the selection of objects of taxation, *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 12; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 581, and even under the equal protection clause of the Fourteenth Amendment, which was not included in the Fifth, the states may distinguish, for purposes of transfer taxes, between property which has borne its fair share of the tax burdens and similar or like property passing to the same class of beneficiaries which has not."

and further held that Congress has the power to select and classify the subjects of taxation (p. 361). (See also, *Commissioner* v. *Jacobson*, 336 U. S. 28 [1949].)

In the *Brushaber* case, cited in the *Fernandez* opinion, *supra*, this Court held the income tax laws constitutional in the face of specific objections to the taxation of different classes of income and the allowance of different deductions to different taxpayers (see also, *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103 [1916]).

The New York Legislature, therefore, has the power, in enacting tax legislation, to select what income and how much of income it wishes to tax and to provide for deductions from taxable income in any amount or for whatever purpose it deems advisable. In enacting subjection j of section 612 of the New York Tax Law, the Legislature of the State of New York did precisely that. It elected to provide a deduction from gross income to parents paying tuition on behalf of their children to nonpublic schools in the State. This was clearly within the power of the Legislature to do.

The District Court equated the deduction from gross income provided in subsection j with real property tax exemption of church property and deduction of contributions to churches from taxable income. In this respect, this Court has itself held that the property of sectarian institutions may constitutionally be exempted from taxation (*Walz* v. *Tax Commission*, 397 U. S. 664 [1970]) as cited by the District Court in the instant case. In so doing, this Court stated (p. 678):

> "Nothing in this national attitude toward religious toleration and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion, and on the contrary it has operated affirmatively to help guarantee the free exercise of all religious beliefs. Thus it is hardly useful to suggest that tax exemption is but the 'foot in the door' * * * leading to an established church."

In addition to the exemptions from property and income taxation provided to nonpublic educational institutions, both sectarian and secular, State and Federal tax laws both provide for deductions from individual income for contributions made to such institutions and for job related education costs paid to such institutions, regardless of their nature as sectarian or secular.

As the District Court pointed out in the instant case, tax exemption of the property and incomes of sectarian institutions and the authorization of deductions from gross income of contributions given to such institutions constitute a benefit, albeit remote, to religion through the sectarian institutions. In each case, however, such tax exemption or such deduction has been allowed and held not to constitute a violation of the Establishment Clause.

The argument was made by plaintiffs in the District Court that the distinction between contributions and tuition payments lies in the unrestricted nature of the contribution, the lack of a *quid pro quo*, and the motive behind the payment. Of course, as the District Court stated those considerations would be relevant only in construction of the Federal revenue statute; they are not constitutional limitations or requirements. Absence of benefit or *quid pro quo* is also, however, not even a uniform statutory requirement. In *Citizens & Southern National Bank* v. *United States* (243 F. Supp. 900 [W. D. So. Carolina, 1965]) and *Crosby Valve & Gage Co.* v. *Commissioner* (380 F. 2d 146 [1st Cir., 1967], cert. den. 399 U. S. 976), the Courts recognized that contributions have many motives, including personal benefit. As to motive, the Court in *Crosby Valve* stated (380 F. 2d p. 146):

> "Were the deductibility of a contribution under section 170(c) of the Internal Revenue Code of 1954 to depend on 'detached and disinterested generosity', an important area of tax law would become a mare's nest of uncertainty woven of judicial value judgments irrevelant to eleemosynary reality. Community good will, the desire to avoid community bad will, public pressures of other kinds, tax avoidance, prestige conscience-salving, a vindictive desire to prevent relatives from inheriting family wealth—these are only some of the motives which may lie close to the heart, or so-called heart, of one who gives to a charity."

Furthermore, as pointed out, expenses for job related education are deductible from income for tax purposes. In that case, there is a direct benefit to the payer, a *quid pro quo* has been received without affecting deductibility. Here too, the Legislature had the power to exempt a portion of a tuition-paying parent's income from taxation without infringing upon any constitutional prohibitions.

The modification of adjusted gross income provision also meet the intent and effect tests set forth in the *Schempp* case (*Abington School District* v. *Schempp*, 374 U. S. 203 [1963]). The purpose of this statute was to provide tax relief to tuition-paying parents of children in nonpublic schools, based in part upon the fact that their continued support of those schools relieves the taxpayers from the support of additional children in public schools. The primary effect, as found by the District Court, would not be aid to the nonpublic schools, but rather aid to the parents. The District Court stated that the financial benefit to the parents would most likely not be paid over to the nonpublic schools as additional contributions but would rather be used for the personal advantage of the parent.

It is submitted that subsection j of section 612 of the Tax Law is no more than a State recognition that the cost of nonpublic school tuition is an expense to taxpayers which should be considered in determining their tax liability. It is a recognition that the selection by those taxpayers of a nonpublic school education for their children has reduced the tax burden of those who support public education and that that secular contribution to the public should be recognized.

The purpose and primary effect of subsection j is the purely secular one of relieving a portion of the tax burden of parents of nonpublic school children. The section does not provide for payment of money directly to the schools but merely recognizes the financial burden of parents of nonpublic school children. Additionally, there is no entanglement, excessive or otherwise, between the State and religion as a result of this amendment to the New York Tax Law, because there is no contact whatsoever provided therein between sectarian institutions and the State.

Thus, it is submitted, subsection j of section 612 of the Tax Law infringes upon no constitutional rights of the plaintiffs, nor upon any provision of the Constitution itself.

## II.

**Article 12 of the New York Education Law, as added by Chapter 414 of the Laws of 1972, is a valid exercise of the police power of the State and does not infringe upon the First Amendment to the Constitution of the United States.**

Article 12 of the Education Law, which provides health, welfare and safety grants to nonpublic schools for maintenance, repair and physical operation of those schools, was enacted for the express purpose of protecting the health and safety of the children attending those schools. In enacting that Article, as part of Chapter 414 of the Laws of 1972, the Legislature specifically made a finding in the act that the State has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools. It recognized that that objective is met in the case of public school children through grants of State aid and through municipal taxing power. The Legislature further specifically found that the fiscal crisis in nonpublic education has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of children attending those schools, particularly in urban areas; that nonpublic schools in low income areas are characterized by deteriorating physical structures; and that the parents of children enrolled in those nonpublic schools do not have the financial resources necessary to maintain the structures. The Legislature concluded that the State has the right and obligation to ensure that the physical environment in nonpublic schools in those low-income areas is both healthful and safe. Except for the conclusions as to constitutionality, the District Court found that the purposes of the act were as stated and were secular in interest.

In order to meet the objective of safe and healthful buildings for nonpublic school children, the Legislature has provided in this statute for grants for maintenance, repair and operation of buildings. Those grants amount to a maximum of $30 per pupil, increased by an additional $10 per pupil attending classes in a building constructed prior to 1947. The grants are limited to not more than 50% of the average statewide per pupil cost of maintenance and repair in public schools, and may not exceed the amount actually expended by the nonpublic school for maintenance, repair and operation in the preceding base year, as certified by a required audited statement of expenditures.

Not all nonpublic schools will qualify for grants under this act. Only those schools will qualify which have been certified as serving a high concentration of low income pupils for the purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. A. § 425).[2] Thus, only a small percentage of the total number of nonpublic schools will be eligible for these grants.

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying it to current situations (see *e.g.*, *Everson* v. *Board of Education*, 330 U. S. 1 [1947]; *Abington School District* v. *Schempp*, *supra*).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems

[2] Title IV of the Federal Higher Education Act of 1965 provides that a portion of moneys borrowed to secure education will be forgiven to any borrower who teaches in a school serving a high concentration of children from low income families.

which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove the colonists from Europe to America. But those same practices were transplanted to the New World and, at the time of the adoption of the Constitution and the Bill of Rights, there were established churches in a majority of the original Thirteen Colonies and almost every colony exacted some kind of tax for church support. In the language of the opinion of this Court in the *Everson* case, 330 U. S., p. 11:

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment? While not a member of the Congress which adopted the Bill of Rights, Thomas Jefferson is considered as a spokesman for the anti-establishment movement. It was he who first used the phrase "a wall of separation between church and state" in his letter to the Danbury Baptists in reply to their address of congratulation and good wishes upon his becoming President of the United States. That Jefferson did not consider this "wall" to bar all relations between government and religion is clear from both his actions and subsequent writings. Thomas

Jefferson was President of the United States for 8 years, during which time Federal funds were used to aid religion in various ways without protest from the President. Federal funds were used to support missionaries to Christianize and civilize the Indians. The chaplain service for the Army and Navy had been established long before Jefferson became President and was continued under Jefferson. Probably Jefferson's most specific statement in regard to the relation of government to religion is found in a statement made in 1822, after he had left the presidency, concerning freedom of religion at the University of Virginia, of which he was one of the founders. In his report as Rector, Mr. Jefferson stated:[3]

> "The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. * * * A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provisions made for instruction in the other branches of science. * * * It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University * * *. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected * * * or in the lecturing room of such professor."

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[3] 19 The Writings of Thomas Jefferson (Memorial Edition, 1904) 414 *et seq.*, quoted in *McCollum* v. *Board of Education*, 333 U. S. 203, 245-246 (1948).

Jefferson, therefore, saw no breach in the "wall of separation" resulting from nonpreferential aid to sectarian students.

Next to Jefferson, Madison ranks as probably the most significant spokesman on the meaning of the First Amendment. Possibly he should even be given foremost status since he was primarily responsible for the language of the Amendment. On June 8, 1789, Madison in the First Congress stated that his understanding of the meaning of the Amendment was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[4] In his *Detached Memoranda*, written some time after 1817, Madison wrote that the people of the United States "have the noble merit of first unshackling the conscience from persecuting laws and of establishing among religious sects a legal equality."

Madison also was President of the United States for 8 years, during which time Federal funds supported military chaplaincies and missionaries to the Indians without criticism from the President.

Surely we can find no support in the writings and opinions of the formulators of and spokesmen for the First Amendment for the argument that public aid to children regardless of their religion constitutes an establishment of religion. Nor can any support be found for that proposition in the total record of the Presidents or the Congress.

As previously stated, Federal funds for missionaries to the Indians were first paid under Washington and continued until 1900 when changed conditions on the reservations, not

[4] 1 Annals of Congress 729-731 (Benton ed. 1858).

constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering of oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.[5]

Many other Federal statutes have provided nondiscriminatory aid to students attending public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act,[6] free milk under the Agriculture Act of 1949,[7] the National Defense Education Act of 1958,[8] College Housing Act of 1950,[9] the Higher Education Facilities Act,[10] the Higher Education Act,[11] the Elementary and Secondary Education

[5] Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92; see also *Bradfield* v. *Roberts*, 175 U. S. 291 (1899).

[6] 60 Stat. 230 (1946), 42 U. S. C. § 1751.

[7] 63 Stat. 1051 (1949), 7 U. S. C. § 1431.

[8] 72 Stat. 1580 (1958), 20 U. S. C. §§ 401-589.

[9] 12 U. S. C. §§ 1749-1749c.

[10] 77 Stat. 363 (1963), 20 U. S. C. §§ 701-757.

[11] 79 Stat. 1219 (1965), 20 U. S. C. §§ 1001-1144.

Act,[12] the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,[13] and the G. I. Bill of Rights.[14]

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to all schools, all pupils, or all institutions, regardless of their religious affiliation (See, also, *Protestants and Other Americans United* v. *Essex*, 28 Ohio St. 2d 79, 275 N. E. 2d 603 [Nov. 24, 1971]).

It is submitted, however, that the statute here at issue is not directed to the aid of religion or religious institutions, but rather is a measure, adopted in the exercise of the State's police power, to secure the health and safety of its children; a fact found by the District Court in this case.

In a case involving a tax exemption for railroads (a different factual situation), this Court clearly expressed the rules of construction utilized in evaluating attacks upon the constitutionality of statutes (*Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36 [1933]). In that case, the Court stated (p. 42):

> "It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. * * * The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and

[12] 79 Stat. 27 (1965), 20 U. S. C. §§ 236-244, 331-332.

[13] 58 Stat. 765 (1944), 40 U. S. C. §§ 484(j) and 484(k); 107 Cong. Rec. 17351.

[14] 66 Stat. 663 (1952), 38 U. S. C. § 911.

> fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way. * * * Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257."

The New York Court of Appeals cited the above case and quoted from it in rejecting an attack on a health statute (*Grossman* v. *Baumgartner*, 17 N Y 2d 345 [1966]), holding (p. 350) that the "police power is exceedingly broad" and that "the courts will not substitute their own judgment of a public health problem."

In *Jacobson* v. *Massachusetts* (197 U. S. 11 [1905]), Mr. Justice HARLAN, discussed the extent of the State's police power, observing (pp. 24-25):

> "The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet *it has distinctly recognized the authority of a State to enact* quarantine laws and *'health laws of every description;'* indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (Emphasis added.)

And in *City of El Paso* v. *Simmons* (379 U. S. 497 [1965]), this Court clearly expounded the broad powers of state legislatures in police power legislation, holding (p. 508):

> "The State has the 'sovereign right * * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of the State, we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary.' "

While the cases above cited dealt with statutes different in specific scope and purpose from the statute here at issue, they are all alike in one respect, that is, they deal with questions of public health and safety. Here too, there is a distinction that in those cases, the questions were of restrictive regulation, rather than the expenditure of public funds. However, there is no essential difference in the scope of the police power between police power regulations which restrict and police power legislation which expends money to accomplish a health and safety purpose.

This identity of result was recognized by this Court in *Everson, supra.* In that case, the Court approved the expenditure of public funds to provide school bus transportation for children attending nonpublic schools, in part at least, as an exercise of the State's police power. In considering whether the providing of bus transportation served a valid secular purpose, this Court stated (p. 7):

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose * * *. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or hitchhiking'."

Again, with reference to the purpose of the New Jersey legislation there at issue, the Court stated (p. 18):

> "Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

It would be an anomaly if the State could provide for the safety of children in reaching the doors of the nonpublic schools, but could not guard them against hazards to their health and safety once they enter those doors. The statute here involved, in providing for the physical safety of the school buildings in which children attend classes, is no less a valid exercise of the State's police power than is the providing of school bus transportation, or health services to nonpublic school children.

It should also be noted that, in approving a Federal statute providing for the cost of construction of new buildings at all private colleges, including sectarian colleges, this Court in the *Tilton* case approved more extensive legislation than the statute here at issue, which provides only for a partial reimbursement of the costs of physical repair and maintenance of only a small percentage of the nonpublic school buildings in the State (*Tilton v. Richardson*, 403 U. S. 672 [1971]). In the *Tilton* and *Lemon* cases (*Tilton* v. *Richardson, supra; Lemon* v. *Kurtzman*, 403 U. S. 602 [1971]), this Court reiterated the tests for determining whether a statute infringes upon the First Amendment prohibitions against laws which establish religion. The tests, as stated in that decision and others, is whether there is a secular purpose and a primary effect which neither advances nor inhibits religion and whether there is excessive entanglement between the State and religion as a result of the legislation. Here the purpose and primary effect is clearly the provision of a healthful and safe

environment for children attending nonpublic schools, just as the State assures the same environment to children attending public schools.

The Courts have consistently said that the mere fact that a public program makes it easier for children to attend nonpublic schools does not make it a program which is directed to the aid of religion or which has a primary effect of aiding religion (*Everson* v. *Board of Education, supra; Board of Education* v. *Allen*, 392 U. S. 236 [1968]). Nor does a statute which provides for a flat grant, restricted to an amount no greater than the actual costs of maintenance and repair, result in excessive entanglement or result in a need for continued surveillance.

The *Tilton* Court itself observed that "The entanglement between church and state is also lessened here by the non-ideological character of the aid which the government provides." In *Lemon*, this Court commented (pp. 616-617):

> "Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

And again, in *Tilton*, the Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

> "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts*, 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious

purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all give aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and nonideological. It provides for the cost of repair and maintenance of school buildings in areas which serve a high concentration of low income pupils, where presumably the parents of those children are unable to bear the costs of maintenance, particularly of older structures.

Although compensation of the schools for these nonideological costs might free other money of the schools so that it could be used to advance the sectarian mission of the schools, that is not a ground for invalidation of the act as this Court stated in *Tilton*, as quoted above.

Article 12 of the New York Education Law, as added by Chapter 414 of the Laws of 1972, is, we submit, a valid exercise of the State's police power to protect the health, welfare and safety of its children and is, therefore, not constitutionally invalid under the First Amendment to the Constitution of the United States.

## III.

**Article 12-A of the New York Education Law, as added by chapter 414 of the Laws of 1972, is a valid exercise of the State's power and responsibility to protect the constitutionally guaranteed right of parents to select their children's education and to insure to low-income parents their ability to exercise those rights.**

New Article 12-A of the New York Education Law provides for the reimbursement by the State of a portion of the tuition paid to nonpublic schools by parents whose State net taxable income is less than $5,000 per year. Tuition reimbursement will be paid in an amount equal to the lesser of 50% of tuition paid or $5 per month per pupil attending elementary school and $10 per month per pupil attending a secondary school. Thus, the maximum amount of reimbursement payable on behalf of a child is $50 for an elementary school pupil or $100 for a secondary school pupil.

Initially, it should be noted here that this statute differs in one significant respect from the statutes at issue in the *Wolman* and *Sloan* cases, (*Wolman* v. *Essex*, 342 F. Supp. 399 [S. D. Ohio, aff'd 34 L. Ed. 2d 69; 1972]; *Lemon* v. *Sloan*, 340 F. Supp. 1356 [E. D. Pa. 1972 prob. juris. noted January 22, 1973. The statutes of Ohio and Pennsylvania, at issue in those cases, provided tuition reimbursement to *all* parents of children attending nonpublic schools, whereas the New York statute here provides for reimbursement only to low-income parents. This distinction, and the legislative findings in support of the act, are, we submit, decisive in support of constitutionality of this statute.

In enacting Article 12-A, the Legislature of the State of New York specifically recognized that parents have a con-

stitutional right to satisfy a state's compulsory attendance laws by selecting either a public or nonpublic school education for their children, including a sectarian education. The Legislature further found that that constitutional right is diminished or even denied to children of lower income families; and that the State has a right to make provision so that such families and their children are not excluded from the exercise of their constitutional right of selection because of their inability to pay the cost of a nonpublic school education.

Article 12-A is the State's attempt to meet that objective of assuring that its citizens are not excluded from a constitutionally secured right solely because of inability to meet the cost of that right.

The Legislature's findings in relation to constitutional rights and obligations were not carved out of thin air. They have a solid foundation in the decisions of this Court.

In *Pierce* v. *Society of Sisters* (268 U. S. 510 [1925]), this Court held that a State may not require all children to attend public schools, and that parents have a constitutionally guaranteed right to satisfy a State's compulsory attendance laws by selecting either a public or nonpublic school education, including a sectarian education. This is the very right which New York here seeks to protect.

This Court has also held that a citizen's access to the exercise of a constitutional right cannot be denied or withheld because of his inability to pay for the exercise of that right (see, *e.g.*, *Boddie* v. *Connecticut*, 401 U. S. 371 [1971]—access to Courts; *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 [1966]—right to vote; *Gideon* v. *Wainwright*, 372 U. S. 335 [1963]—right to counsel).

In *Boddie*, in which the Court held that access to the judicial process could not be denied due to inability to pay court costs, Mr. Justice DOUGLAS in his concurring opinion stated (p. 383):

> "'Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant are repugnant to the Constitution.'"

In *Harper*, the Court invalidated a poll tax as a condition precedent to the exercise of the right to vote, holding that the elective franchise may not be withheld because of a voter's inability to pay a poll tax.

Additionally, the State and Federal governments have both recognized a responsibility toward the support of indigents, both as to the necessities of life and access to constitutional rights. The social welfare system itself is a recognition of that responsibility, as is the provision of free legal counsel to indigents in both civil and criminal cases, and as is free health care, the school lunch program, and similar programs and services.

New York's provision for partial tuition reimbursement is reasonably calculated to enable low-income parents to secure effective access to their constitutional right to select a nonpublic school education for their children. It is submitted that the State has the power to reimburse those who would be denied their rights because of their inability to pay the costs of tuition.

It is further submitted that this program also meets the criteria set by this Court relative to the constitutionality of statutes which may provide incidental aid to sectarian institutions. Article 12-A has a secular purpose: that is,

securing of the constitutional rights of low-income citizens. Its primary effect is not to aid or inhibit religion but rather to aid those same low-income citizens in securing their choice of education for their children. The fact that there may also be some indirect benefit to the nonpublic schools does not alone, as this Court held in the *Board of Education* v. *Allen, supra*, "demonstrate an unconstitutional degree of support for a religious institution". Finally, reimbursement to *parents* of a portion of tuition which *they* have paid does not result in an excessive entanglement between the State and the *schools*. There is, in fact, no contact whatsoever between the two which could result in any entanglement.

It is, therefore, submitted that Article 12-A of the New York Education Law, as added by chapter 414 of the Laws of 1972, is constitutional and valid in all respects.

## IV.

### All parts of chapter 414 are severable.

The provisions of chapter 414 are separable because it was clearly the intention of the Legislature, as expressed in the legislative intent clauses of the act, to provide five separate and distinct proposals for the aid of children enrolled in nonpublic schools, for their parents and for public schools suffering from the impact of the closing of nonpublic schools. Additionally, chapter 414 contains a specific severability clause (Section 11). The District Court majority, relying upon this Court's decisions in *Tilton* (403 U. S. at 683-84), and *Champlin Refining Co.* v. *Corporation Commission of Oklahoma* (286 U. S. 210, 234 [1932]), held sections 3-5 of chapter 414 to be separable from sections 1 and 2 (and 6-10). Indeed, each of the sub-

stantive parts of the statute stands alone and could have been enacted as a separate law without modification. Then again, even if the parts of a given statute are not independent of each other, as was true in *Tilton*, "[t]he cardinal principle of statutory construction is to save and not to destroy". *NLRB* v. *Jones & Laughlin Steel Corp.* (301 U. S. 1, 30 [1937]).

The principle of separability under New York law was clearly stated by the Appellate Division of the New York Supreme Court, Second Department, in *DiPaola* v. *Reilly* (22 A D 2d 910 [1964]) when it stated (pp. 910-911):

> "As Chief Judge CARDOZO observed in *People* v. *Mancuso* (255 N. Y. 463, 474): '"The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether"'. In determining the separability of a statute, the test is two fold: the Legislature must have intended that the act be separable; and the act must be capable of separation, in fact (2 Sutherland, Statutes and Statutory Construction [3d ed.] § 2404). The inclusion of a separability clause raises a presumption that the Legislature intended the act to be divisible (*Williams* v. *Standard Oil Company*, 278 U. S. 235, 242)."

Again, the New York Court of Appeals stated in *People ex rel. Alpha Portland Cement Co.* v. *Knapp* (230 N. Y. 48, 60 [1920]):

> "Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment (*Loeb* v. *Columbia Township Trustees, supra*). The principle of division is not a principle of form. It is a principle of function. * * * The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."

Here the statute includes a separability clause, raising a presumption of separability. Functionally, the statute is divisible, each part can stand on its own without the others.

In view of the express intent of the Legislature there can be no valid issue as to separability.

## CONCLUSION

**Sections 1 through 5 of chapter 414 of the New York Laws of 1972 are constitutional in all respects, and the District Court's judgment with respect to sections 3, 4 and 5 should therefore be affirmed and the judgment with regard to sections 1 and 2 should therefore be reversed.**

Dated: March 19, 1973.

Respectfully submitted,

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# APPENDIX

## Chapter 414, Laws 1972

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, with an immediate effective date, except that sections 7, 8 and 9 were effective July 1, 1972.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

### *ARTICLE 12*

### *HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN*



*§549. Legislative findings. The legislative hereby finds and declares that:*

*1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.*

*2. The state discharges this responsibility to public school children through substantial amounts of per public financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.*

*3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five, which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.*

*4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but non the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.*

*5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.*

*Chapter 414, Laws 1972*

*§ 550. Definitions. In this article:*

*1. "Commissioner" shall mean the state commissioner of education.*

*2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000 (d), (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).*

*3. "Base year" shall mean the school year immediately preceding the current year.*

*4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.*

*5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.*

*6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.*

*7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.*

*§ 551. Apportionment. 1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.*

*2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.*

*§ 552. Applications, reports, regulations. Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.*

*§ 553. Installments. The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July*

*first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.*

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A to read as follows:

## *ARTICLE 12-A*

## *ELEMENTARY AND SECONDARY EDUCATION OPPORTUNITY PROGRAM*



*§ 559. Legislative findings. The legislative hereby finds and declares that:*

*1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.*

*2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.*

*3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.*

*4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.*

*5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.*

*Chapter 414, Laws 1972*

*§ 560. Short title. This article shall be known as the "Elementary and Secondary Education Opportunity Program".*

*§ 561. Definitions. The following terms, whenever used in this article, shall have the following meanings:*

*a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.*

*b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.*

*c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred*

*four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000 (d), and (iii) which is entitled to a law exemption under section five hundred one (a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended.*

*d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.*

*e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.*

*f. "Commissioner" means the commissioner of education of the State of New York.*

*g. "Regular school year" means all of the months of the calendar year exclusive of July and August.*

*§ 562. Tuition reimbursement payments to parents. 1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one*

*through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.*

*2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.*

*3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.*

*4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified*

*statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.*

*§ 563. Commissioner; powers. The commisioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.*

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

*(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.*

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subjection (j), to read as follows:

*(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to substract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades*

*one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragaph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.*

| *If New York adjusted gross income is:* | *The amount allowable for each dependent is:* |
|---|---|
| *Less than $9,000* | *$1,000* |
| *9,000—10,999* | *850* |
| *11,000—12,999* | *700* |
| *13,000—14,999* | *550* |
| *15,000—16,999* | *400* |
| *17,000—18,999* | *250* |
| *19,000—20,000* | *150* |
| *21,000—22,999* | *125* |
| *23,000—24,999* | *100* |
| *25,000 and over* | *-0-* |

*(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.*

*(3) Definitions. (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.*

*(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252,42 U.S.C. § 2000 (d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.*

*(C) "Regular school year" as used in this subsection shall mean the months of the taxable year exclusive of July and August.*

*(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.*

§ 6 Legislative findings. The legislative hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils,

the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps , fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

*15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.*

*a. Definitions. As used herein:*

*1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.*

*2. borough shall mean any borough of the city school district of the city of New York.*

*3. aid ratio shall mean the higher of the actul aid ratio established for such district or borough, or thirty-six per centum.*

*b. Computation. The amount to be apportioned shall be the product of:*

*1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and*

*2. the aid ration of such school district or borough.*

*c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ration for each borough.*

*d. Any apportionment as herein computed shall be subjected to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.*

*e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year next succeeding such year.*

§8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

1. No schoolhouse shall be erected, *purchased,* repaired, enlarged or remodeled in any school district except in a city school district in a city seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specification shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may proscribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set

forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection *or purchase* of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of

education shall not approve the plans for the erection *or purchase* of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment accessibility; soil conditions; initial and ultimate costs.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

*6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for a appraisal of such buildings as school buildings and the land on which they are situated as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.*

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two

hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, *purchase of existing structures,* for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, *or purchase of existing structures.*

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction *and the purchase of existing structures* the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the cost of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction *and the purchase of existing structures*

may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.